

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 19Sep2001

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In the Matter Of

CAUDLE DEEL,
Claimant

Case No.: 2000-BLA-1052

v.

CLINCHFIELD COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party In Interest

.....
Appearances:

Joseph E. Wolfe, Esquire
Wolfe Farmer Williams & Rutherford
For the Claimant

Timothy W. Gresham, Esquire
Penn, Stuart & Eskridge
For the Employer

Francine A. Serafin, Esquire
Office of the Solicitor, U.S. Department of Labor
For the Party In Interest

Before: ALICE M. CRAFT
Administrative Law Judge

DECISION AND ORDER DENYING REQUEST FOR MODIFICATION

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C.

§ 901 et seq. (the “Act”). The Act and implementing regulations, 20 CFR parts 410, 718, 725 and 727 (the “Regulations”), provide compensation and other benefits to: (1) living coal miners who are totally disabled due to pneumoconiosis and their dependents; (2) surviving dependents of coal miners whose death was due to pneumoconiosis; and (3) surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death (for claims filed prior to January 1, 1982). The Act and Regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR §727.202 (2000). In this case, the Claimant, Caudle E. Deel, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on January 17, 2001, in Abingdon, Virginia. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure, 29 CFR Part 18 (2001). At the hearing, Director’s Exhibits (“DX”) 1-165, Claimant’s Exhibit (“CX”) 1 and Employer’s Exhibits (“EX”) 1-27 were admitted into evidence without objection. Transcript (“Tr.”) 8-14. The parties did not offer any testimony. The record was held open after the hearing to allow the parties to submit briefs. The Employer has submitted its brief. None has been filed on behalf of the Claimant. The record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me.

PROCEDURAL HISTORY

This case has a protracted history which may be summarized as follows:

March 27, 1978 - Mr. Deel filed claim for benefits. DX 34.

August 10, 1979 - Deputy Commissioner (now referred to as the District Director) made initial finding that miner was entitled to benefits. DX 34.

September 6, 1979 - Employer filed Notice of Controversion. DX 34.

May 30, 1980 - Case transmitted to Office of Administrative Law Judges (OALJ) for a hearing. DX 34.

June 11, 1981 - Hearing held before Administrative Law Judge Anastasia T. Dunau. DX 34.

December 11, 1981 - Judge Dunau issued a Decision and Order - Rejection of Claim. Judge Dunau found that although there were x-ray readings which were positive for pneumoconiosis, the preponderance of the x-ray evidence failed to establish the existence of the disease. She found also that none of the criteria for establishing total disability had been met. DX 34.

December 7, 1982 - Miner filed a new claim form. DX 1.

June 20, 1984 - Following development of additional medical evidence by the parties, Deputy Commissioner issued an initial denial of the claim. DX 23.

July 11, 1984 - Claimant requested a hearing. DX 25.

July 28, 1997- Hearing held before Administrative Law Judge Stuart A. Levin. DX 54.

September 21, 1987 - Judge Levin held that the January 1982 claim was a motion for modification of Judge Dunau's rejection of the claim and issued a Decision and Order denying modification. Judge Levin concluded that the Claimant had invoked the interim presumption under *Stapleton v. Westmoreland Coal Company*, 788 F.2d 424 (4th Cir. 1986) (*en banc*) as the record included an x-ray reading which was positive for pneumoconiosis. He went on to find, however, that the presumption had been rebutted because the "medical evidence overwhelmingly supports the conclusion that claimant is not totally disabled in whole or in part by a respiratory impairment arising out of his coal mine employment." DX 55.

October 9, 1987 - Claimant filed an appeal with the Benefit Review Board (the "Board"). DX 56.

September 14, 1988 - Employer filed motion to dismiss appeal as it was based on evidence not of record before Judge Levin. DX 63.

November 15, 1989 - The Board, agreeing with the Employer, issued an Order granting the Claimant leave to file a new motion for modification before the Deputy Commissioner. DX 65.

January 22, 1990 - The Board issued a new order dismissing the appeal and remanding the case to the Deputy Commissioner to process the Claimant's request for modification which had reportedly been filed with the Deputy Commissioner. DX 66.

December 12, 1993 - Following additional development of the evidence by the parties, the District Director referred the case back to OALJ. DX 81.

May 18, 1994 - Hearing held before Administrative Law Judge Frederick D. Neusner. DX 90.

August 31, 1994 - Judge Neusner issued a Decision and Order denying modification on the basis that Claimant had not demonstrated a material change in conditions subsequent to the prior denial of his claim. DX 96.

September 13, 1994 - Claimant filed a new appeal with the Board. DX 97.

August 24, 1995 - The Board considered the Claimant's appeals from the denial of benefits by both Judge Levin and Judge Neusner. Judge Levin's finding that the Claimant had invoked the presumption under §727.203 (a)(1) was vacated as *Stapleton v. Westmoreland Coal Co., supra*, had been reversed by *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135 (1987). Judge Neusner's denial of modification was vacated on the basis that he did not consider whether the prior denials of the claim were based on a mistake of fact. Accordingly, the Board remanded the case to the OALJ for further consideration. DX 107.

March 29, 1996 - Judge Neusner issued a Decision and Order Following Remand concluding that the Claimant had failed to establish the interim entitlement to benefits under Part 727 and had failed to show a change of conditions or a mistake of fact that would support modification of the decision and order denying benefits. DX 111.

February 4, 1997 - Claimant filed medical reports and again requested modification of the denial of his claim. DX 119.

March 21, 1997 - Claim returned to OALJ. DX 132.

July 1, 1997 - Judge Neusner found that the new medical evidence did not demonstrate a material change in conditions nor was there a mistake in the determination of fact in the prior denial of the claim and issued an Order Denying Modification. DX 138.

July 23, 1997 - Claimant requested reconsideration on the basis that he was not granted a requested hearing nor given the opportunity to submit additional evidence prior to the denial of his request for modification. DX 139.

July 31, 1997 - Judge Neusner denied the motion for reconsideration. DX 140.

August 6, 1997 - Claimant appealed the denial of his motion for reconsideration. DX 141.

July 29, 1998 - Board held that Claimant was entitled to notice as to when or whether a hearing is to be held and a time frame within which to submit additional evidence and arguments. Case remanded for such action. DX 146.

June 15, 1999 - After affording the parties the opportunity to present additional evidence and arguments, Judge Neusner issued a Decision and Order again denying modification. DX 156.

March 14, 2000 - New claim form received from Claimant. DX 157.

April 5, 2000 - Claimant's counsel clarified that Claimant wished to pursue the claim as a modification. DX 159.

August 25, 2000 - Case returned to OALJ. DX 165. The District Director referred the claim without a ruling because no new evidence was submitted by the Claimant while the claim was before him. DX 161, 162, 164.

ISSUES

The following were identified and accepted by the Claimant and Employer at the hearing as being the issues in this case:

1. Whether the miner has pneumoconiosis;
2. If so, whether the disease arose out of coal mine employment;
3. Whether the miner is totally disabled;
4. If so, whether his disability is due to pneumoconiosis;
5. Whether there has been a change in conditions or a mistake was made in a determination of fact in the prior denial of the claim.

Tr. 5-6. The Director also challenged the length of coal mine employment. The Claimant alleged 39 years, while the Director found 29.91 years. DX 164. The Employer stipulated to at least 30 years. Tr. 5. The Employer and the Claimant reserved issues relating to the validity of the statute and regulations which are beyond my authority to address. Tr. 6-7.

APPLICABLE STANDARDS

This claim relates to a request for modification of an adverse decision on a claim filed on March 28, 1978. Because the claim at issue was filed after January 1, 1974 and before March 31, 1980, and the miner had more than 10 years of coal mine employment, the Regulations at 20 CFR Part 727 apply. *See* 20 CFR § 727.1 (2000); 20 CFR § 718.2 (2001); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991). Parts 718 (standards for award of benefits for claims filed after April 1, 1980) and 725 (procedures for claims adjudicated under Parts 718 and 727) of the Regulations have undergone extensive revisions effective January 19, 2001. 65 Fed. Reg. 79920 et seq. (2000). The Department of Labor has taken the position that as a general rule, the revisions to Part 718 should apply to pending cases because they do not announce new rules, but rather clarify or codify existing policy. *See* 65 Fed. Reg. at 79949-79950, 79955-79956 (2000). The new rules specifically provide that some revisions to Part 725 apply to pending cases, while others (including revisions to the rules regarding duplicate claims and modification) do not; for a list of the revised sections which do **not** apply to pending cases, see 20 CFR § 725.2(c) (2001). The Department also decided not to republish Part 727 in future editions of the Code of Federal Regulations because relatively few claims are still subject to those

regulations. 65 Fed. Reg. 80029, 80107 (2000).

On February 9, 2001, the United States District Court for the District of Columbia entered a *Preliminary Injunction Order* in a case challenging certain of the new rules, *National Mining Association, et al., v. Elaine L. Chao, et al.*, No. 1:00CV03086(EGS). Pursuant to ¶ 3 of the *Preliminary Injunction Order*, adjudication of claims pending before the Office of Administrative Law Judges on the effective date of the new regulations was stayed absent a finding, after briefing by the parties, that the new regulations would not affect the outcome of the case. On March 15, 2001, I issued an order to the parties to submit briefs on this issue within ten days, stating that failure of a party to submit a brief would be construed as position that the amended regulations will not affect the outcome of the claim. The Employer and the Director filed briefs. The Employer noted that the outcome of this case is primarily governed by Part 727 of the regulations, which have not been amended. The Director has taken the view that the amendments to the regulations will not effect the outcome of this case because they do not materially change the standards for determining coal miners' total disability due to pneumoconiosis that would be applicable to this case in the absence of the new regulations. The Claimant did not submit a brief, and may be viewed, therefore, as taking the position that the revisions will not affect the outcome. While I was considering the case, on August 9, 2001, the District Court entered its decision upholding the new rules and dissolving the preliminary injunction. In this Decision and Order, the "old" rules from Parts 725 and 727 applicable to this case have been cited to the 2000 edition of the Code of Federal Regulations; the "new" rules have been cited to the 2001 edition.

20 CFR § 725.310 provides that within one year of the denial of a claim, any party may request reconsideration on grounds of a change in conditions or because of a mistake in determination of fact. The Board has held that the one year period for requesting modification begins anew from the date of each denial. *Garcia v. Director, OWCP*, 12 B.L.R. 1-24 (1988). There is no limit to the number of times a party may seek modification. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491 (4th Cir. 1999). The Claimant has not allowed one year to elapse from any of the prior denials of his initial claim before seeking modification.

Where modification is sought based on an alleged change in conditions, new evidence must be submitted and the administrative law judge must conduct an independent assessment of the newly submitted evidence, in conjunction with the evidence previously submitted, to determine whether the weight of the evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision. *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Where modification is sought based upon a mistake of fact, new evidence is not a prerequisite, and the adjudicator may resolve the issue based upon "wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Kovac v. BCNR Mining Shipyards, Inc.*, 16 BLR 1-71, 1-73 (1992), *modifying* 14 BLR 1-156 (1990).

Disability benefits are payable to miners totally disabled by pneumoconiosis arising out of coal mine employment. 30 U.S.C. §§ 902(b) and 921(a). If the Claimant demonstrates a material change of conditions or that a mistake of fact has occurred in the prior denial(s) of his claim, pursuant to Part 727 of the Regulations, the Claimant is entitled to the rebuttable presumption that he is totally disabled from pneumoconiosis arising out of his coal mine employment if any of the following four requirements are satisfied:

- (1) chest x-ray, biopsy or autopsy evidence establishes the existence of pneumoconiosis;
- (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary impairment;
- (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen; or
- (4) a well reasoned and documented medical report supports a finding of a totally disabling respiratory impairment.

20 CFR §727.203 (a). The claimant bears the burden of satisfying at least one of these elements by a preponderance of the evidence. *Mullins v. Director, OWCP*, 484 U.S. 135 (1987).

Once the presumption is invoked, the employer may rebut the presumption by establishing:

- (1) the miner is doing his usual coal mine work or comparable and gainful work;
- (2) the miner is able to do his usual coal mine or comparable work;
- (3) the total disability of the miner did not arise in whole or in part out of his coal mine employment; or
- (4) the miner does not have pneumoconiosis.

20 CFR 727.203 (b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

The Claimant did not testify at the hearing before me nor the one held by Judge Levin. The record does include his testimony adduced at the hearings before Judge Dunau and Neusner. DX 34, 90. This was to the combined effect that his coal mine employment was initially all underground. During

the last six years he worked as a welder repairing mine equipment primarily in an above ground shop although he did have to go underground to make repairs about two nights per week. He carried equipment weighing about 10 pounds. He sometimes had to lift heavy loads but did so with help. When he worked underground he had to walk about 300 to 400 feet from the end of the tram track to the site of the breakdown. If the power failed while he was in the mine he may have had to walk two to three miles. He left the mines in 1977 when he reached the age of 55 and had sufficient number of years of employment to earn a pension. He was having breathing problems at the time.

The Claimant alleged that he had 39 years of coal mine employment, having worked for Clinchfield Coal Co. from 1939 to 1977. DX 3. A written statement from the Personnel Department of the Employer indicates that the Claimant had some breaks in service during that period. DX 34. The Director calculated 29.91 years of coal mine employment, DX 164, and the Employer stipulated that he had at least 30 years of coal mine employment, Tr. 5. In their decisions, the previous Administrative Law Judges have made findings ranging from “more than ten years” to 39 years. I find that the Claimant had at least 30 years of coal mine employment. His last coal mine employment was in Virginia. Tr. 8. Therefore this claim is governed by the law of the 4th Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (en banc).

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings available in this case. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may be evidence of “simple pneumoconiosis.” Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of “complicated pneumoconiosis.” A chest x-ray classified as category “0,” including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 410.428(a)(1) (2000). All such readings are therefore included in the “negative” column. X-ray interpretations which make no reference to pneumoconiosis, positive or negative, generally given regarding x-rays taken in connection with medical treatment for other conditions, are listed in the “silent” column.

Physicians’ qualifications appear in parentheses after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the List of A and B-Readers issued by the National Institute of Occupational Safety

and Health (NIOSH).¹ If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A-reader; B= NIOSH certified B-reader; BCR= board-certified in radiology; BCP=board-certified in pulmonology; BCI= board-certified in internal medicine. Readers who are board-certified radiologists and/or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
10/28/69			DX 34 Straugham (B, BCR)
06/01/70			DX 34 Jones (A)
03/12/74		DX 34 Navani (B, BCR)	
03/19/74	DX 46 Kelly (A, BCR) 2/1		
05/29/74	DX 34 Sutherland (A) 2/2	DX 34 Bassham (B, BCR); Pendergrass (B, BCR)	
07/01/74	DX 46 Kelly (A, BCR) 2/2		
01/23/79		DX 34 Wheeler (B, BCR); Bassham (B, BCR)	
06/20/79	DX 34 Brandon (B, BCR) 1/1	DX 34 Bassham (B, BCR); Combs (B); Pendergrass (B, BCR)	
12/03/79	DX 39 & 46 Brandon (B, BCR) 1/1; Fisher (B, BCR) 1/0; DX 46 DeRamos (B) 1/1	DX 34 Mayson (A) 0/0 DX 42 & 51 White (A); Gale (B) 0	

¹NIOSH is the federal government agency which certifies physicians as B-readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Physicians are designated as A-readers after completing a course in the interpretation of x-rays for pneumoconiosis.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
12/23/81	DX 5 Bassali (B, BCR) 1/0 DX 10 & 46 Penman 1/1; DX 39 & 46 Fisher (B, BCR) 1/1; Aycoth (B, BCR) 1/1; DX 44 & 46 Wolfe (A) 1/1; Robinette (B, BCI) 1/0; DX 46 DeRamos (B) 1/1	DX 8 & 44 Wheeler (B, BCR); DX 8 & 46 Morgan (B, BCR); DX 9 Pendergrass (B, BCR); DX 10 Gale (B) 0/1; Ramakrishnan (A) 0/1; Ramakrishnan (A) (2 nd reading) 0/1; Straughan (B, BCR); Hayes (B) 0/0; DX 36, 40 & 51 Felson(B); Wiot (B)	
05/03/82	DX 6 Brandon (B, BCR) 1/1		
06/07/82	DX 11 Wright (A) 1/1	DX 15 Wheeler (B, BCR); Morgan (B, BCR); DX 16 Wiot (B); DX 17 Felson (B)	
12/20/82	DX 39 & 46 Fisher (B, BCR) 1/1; DX 42 DeRamos (B) 1/1	DX 13 Morgan (B, BCR); Wheeler (B, BCR); DX 14 & 42 Pendergrass (B, BCR); DX 42 & 51 Gale (B) 0	DX 12 Ramakrishnan (A)
02/23/84	DX 29 & 38 Sutherland (A) 3/2; DX 39 & 46 Fisher (B, BCR) 1/1; DX 46 DeRamos (B) 1/1; Modi (BCI) 1/1	DX 31 Morgan (B, BCR); Wheeler (B, BCR); DX 32 Wiot (B); Felson (B); DX 42 & 51 Gale (B)	
03/09/84		DX 20 Gaziano (B, BCP); DX 21 Eryilmaz (A) 0; DX 30 Wheeler (B, BCR); Morgan (B, BCR); DX 33 Spitz (B, BCR), Felson (B)	

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
09/13/84	DX 46 DeRamos (B) 1/1	DX 42 & 51 Fisher (B, BCR) 0/1; Williams (B) 0/1; Gale (B) 0; Bassali (B, BCR); Mullens; DX 51 Byers (B, BCP) 0/1	
05/20/86	DX 50 Aycoth (B, BCR) 2/1	DX 45 & 51 Byers (B, BCP) 0/1; DX 47 & 51 Wheeler (B, BCR); Scott (B, BCR); DX 48 & 51 Spitz (B, BCR); Felson (B); DX 51 Castle (B, BCP); Stewart (B, BCP); Hippensteel (B, BCP)	
01/17/90	DX 67 Mathur (B, BCR) 1/1; Aycoth (B, BCR) ½; Capiello (B) 1/1; Fisher (B, BCR) 1/1	DX 67 Ramakrishnan (A) 0/1; DX 70 Dahhan (B); Spitz (B, BCR); Wiot (B); DX 86 & 88 Scott (B, BCR); Wheeler (B, BCR)	
07/10/90	DX 73 Mathur (B, BCR) 1/0; Pathak (B) 1/0; Capiello (B) 1/1	DX 74 Spitz (B, BCR); Wiot (B); DX 75 Pendergrass (B, BCR) 0/0; DX 76 Pitman (B, BCR)	
04/01/91			EX 6 Ramakrishnan (A)
01/06/94		DX 83 & 88 Sargent 0/0 (B, BCP) ; DX 84 & 88 Spitz (B, BCR); Wiot (B); DX 85 & 88 Fino (B, BCP)	
04/08/94	DX 87 Ranavaya (B) 1/0; DX 87 & 91 Mathur (B, BCR) 1/1; DX 89 Pathak (B) 1/1	DX 93 Spitz (B, BCR); Wiot (B); Scott (B, BCR); Wheeler (B, BCR)	
08/26/95		DX 122 Navani (B, BCR)	DX 119 Johnstone

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
10/06/95		DX 123 Navani (B, BCR)	
04/08/96			DX 119 DePonte (B, BCR)
04/09/96		DX 135 Lippman (B); DX 137 Scott (B, BCR); Wheeler (B, BCR)	DX 119 DePonte (B, BCR)
04/10/96		DX 135 Lippman (B)	DX 119 DePonte (B, BCR)
04/19/96		DX 133 Lippman (B); DX 137 Scott (B, BCR); Wheeler (B, BCR)	DX 119 DePonte (B, BCR)
05/01/96		DX 124 Navani (B, BCR); DX 137 Scott (B, BCR); Wheeler (B, BCR)	DX 119 Foster
05/07/96		DX 125 Navani (B, BCR)	DX 119 Hutchison
05/08/96		DX 126 Navani (B, BCR)	DX 119 Gentry
05/11/96	DX 127 Navani (B, BCR) (not classified but checked "pleural abnormalities consistent with pneumoconiosis")	DX 137 Scott (B, BCR); Wheeler (B, BCR)	DX 119 Foster
05/20/97		DX 149 Wheeler (B, BCR); Scott (B, BCR); Dahhan (B)	
07/08/97		EX 10 Fino (B, BCP); EX 15 Wheeler (B, BCR); EX 16 Scott (B, BCR)	
08/07/97			EX 5 Ramakrishnan (B)
08/22/98		EX 11 Fino (B, BCP); EX 17 Scott (B, BCR)	EX 4 Doyle

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis	Silent as to the Presence of Pneumoconiosis
08/25/98		DX 151 Fino (B, BCP); Scott (B, BCR); Wheeler (B, BCR)	DX 150 Gopalan (A)
11/11/98		EX 12 Fino (B, BCP); EX 18 Wheeler (B, BCR); EX 19 Scott (B, BCR)	
12/19/99		EX 13 Fino (B, BCP); EX 20 Wheeler (B, BCR); EX 21 Scott (B, BCR)	
07/10/00		DX 162A Hippensteel (B, BCP); EX 1 Wheeler (B, BCR); EX 2 Scott (B, BCR); EX 14 Fino (B, BCP)	
10/23/00	CX 1 & EX 27 Patel (B, BCR) 1/0	EX 23 Fino (B, BCP); EX 24 Scott (B, BCR); EX 25 Wheeler (B, BCR)	

Biopsy Evidence

The record does not contain any report of a biopsy of the Claimant's lungs.

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV₁) and maximum voluntary ventilation (MVV). The following chart summarizes the results of the 15 pulmonary function studies of record dating from July 8, 1974 to October 23, 2000 in this case. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In order to establish disability for a person of Claimant's height (71" to 72"), the FEV₁ must be equal to or less than 2.6, and the MVV must be equal to or less than 104. 20 CFR § 727.203(a)(2) (2000).

Ex. No.	Date	Age	Height	FEV ₁ Pre-/ Post	MVV Pre-/ Post	FVC Pre-/ Post
DX 34	07/08/74	53	71.25"	3.65	102	4.4
DX 34	01/23/79	58	72.5 ²	3.41	127	4.37
DX 34	08/31/79	58	71.25	2.9	90	
DX 34	12/03/79	59	71	3.35 3.44	120 101	4.17 4.26
DX 11	06/07/82	61	71	3.04	115	3.49
DX 42 & 51	01/11/84	63	73	2.83	73	3.45
DX 18 & 51	03/09/84 ³	63	73	2.95	108	3.76
DX 42 & 51	09/13/84	63	72	3.87	68	4.71
DX 45 & 51	05/20/86	65	72	3.17	97	3.92
DX 44	06/23/87	66	72	3.38	113	3.98
DX 67	01/17/90	69	72	3.43 3.24	95.7 77.7	4.32 3.98

²The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance of 3" in the recorded height of the miner, I have taken the average height (71.7") in determining whether the studies qualify to show disability under the regulations. None of the tests are qualifying to show disability, whether considering the average height or the heights listed by the physicians who administered the testing.

³The FEV₁ on this test were originally reported to be 1.99 and the FVC was reported to be 2.3. DX 18. However, Dr. Sarah B. Long, reviewed the tracings for this test at the request of the Employer and opined that the FEV₁ and FVC values had been wrongly calculated. DX 51. The record also includes a consultant report by an unidentified physician which appears to have been obtained by the Department of Labor and which likewise finds the values to have been miscalculated in the original report. DX 22. Accordingly, I have adopted the values reported by Dr. Long.

Ex. No.	Date	Age	Height	FEV ₁ Pre-/ Post	MVV Pre-/ Post	FVC Pre-/ Post
DX 83 & 88	01/6/94	72	71	2.82 3.08	109	3.69 3.86
DX 87	04/08/94	73	73	3.09	101	3.95
DX 136	05/20/97	76	71	2.54 2.7		3.4 3.69
CX 1 & EX 27	10/23/00	79	70	2.5 2.69	101 107	3.62 3.88

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O₂) compared to carbon dioxide (CO₂) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The blood sample is analyzed for the percentage of oxygen (PO₂) and the percentage of carbon dioxide (PCO₂) in the blood.

Exhibit Number	Date	PCO ₂ at rest	PO ₂ at rest	PCO ₂ exercise	PO ₂ exercise
DX 34	07/27/74	37.9	77		
DX 34	01/23/79	34	73		
DX 34	12/03/79	37	78	35	91
DX 42	03/23/83	40	85		
DX 18	03/09/84	38.3	71.5	37.2	82.2
DX 42	09/13/84	38.8	81.8		
DX 45	05/20/86	41.1	80.6		
DX 44	06/23/87	36.8	69.3		
DX 67	01/17/90	39	93.1		

Exhibit Number	Date	PCO ₂ at rest	PO ₂ at rest	PCO ₂ exercise	PO ₂ exercise
DX 83	01/06/94	40.4	78.6		
DX 87	04/08/94	43.9	74		
DX 136	05/20/97	41.7	82.3		
DX 162A	07/10/00	42	82		
CX 1 & EX 27	10/23/00	37	77		

Medical Opinions

During the pendency of this claim, the Claimant has undergone evaluations for the purpose of determining whether he is totally disabled by pneumoconiosis. These have been conducted by physicians of his own, the Employer's and the District Director's choice. Generally, these evaluations have included health, social and work histories, physical examinations, pulmonary function studies, blood gas tests and chest x-rays.

The earliest evaluation of record was performed by Dr. William Schmidt on July 27, 1974. Dr. Schmidt interpreted the chest x-ray taken at that time as suggesting possible coal workers' pneumoconiosis, category 0/1, but since the Claimant was working as a welder, the possibility of siderosis had also to be considered. No comment was made as to the degree of disability, if any, caused by a respiratory or pulmonary condition. DX 34.

An evaluation was conducted for the District Director by Dr. Richard S. Buddington on January 29, 1979. Dr. Buddington diagnosed the Claimant as having a slight chronic pulmonary disease which he did not specifically relate to coal mine employment. He opined that the slight degree of impairment would not cause dyspnea during the usual activities of daily living but said extreme breathlessness may develop on heavy exertion. DX 34.

Dr. James Castle evaluated the Claimant for the Employer on December 6, 1979. He opined that there was no evidence, either physiologic, radiographic or by physical examination, of coal workers' pneumoconiosis or any lung disease at that time. He noted that the pulmonary function studies were entirely normal as were the prior-to-exercise blood gases. DX 34.

The Claimant submitted a report from Dr. Wright regarding the Claimant's visits to his office on June 4 and 7, 1982. He complained at the first visit of periods of dizziness with postural change and generalized aching with intermittent fleeting sharp. Dr. Wright noted his q 1/1 reading of the Claimant's

chest x-ray and diagnosed coal workers' pneumoconiosis as well as chronic obstructive pulmonary disease and chronic bronchitis. He also diagnosed arteriosclerotic heart disease and opined that the Claimant was "occupationally disabled for coal mining and work in a dusty environment." The June 7, 1982 pulmonary function study results were appended to the report without interpretation or further comment. No physical findings were reported. DX 11.

The Claimant also submitted a report from Dr. J. C. Buchanan of a physical examination conducted on December 20, 1982 when the Claimant complained of shortness of breath and chest pains. His breath sounds were described as very faint. There were no rales, rubs or dullness noted. Dr. Buchanan noted that although there was no clubbing, the nails had a slight convexity suggestive of pulmonary disease. His diagnosis was "chronic obstructive pulmonary disease (By history Coal Worker's Pneumoconiosis)" and "screen for coronary artery disease." A chest x-ray was ordered. DX 37.

Dr. Robinette evaluated the Claimant on September 20, 1984. In his report, addressed to Claimant's then counsel, Dr. Robinette concluded:

It is my feeling that Mr. Deel relates a history of progressive dyspnea. The etiology of this dyspnea may be related to his history of significant dust exposure as a coal miner but I am unable to quantitate any significant abnormality by either radiographic standards or by pulmonary function abnormality which could be ascribed to coal workers' pneumoconiosis. Additionally, there is no significant clinical history supporting a diagnosis of industrial bronchitis which may be causing Mr. Deel's dyspnea.

DX 42 and 51.

Dr. Kanwal evaluated the Claimant for the Department of Labor on March 8, 1984. He diagnosed what appears from his handwritten report to be chronic bronchitis and coal dust exposure with an additional, illegible diagnosis. He indicated that the diagnosed conditions were related to dust exposure in mine employment because of prolonged dust exposure and having stopped smoking for 30 years. He assessed the Claimant's medical limitations as his being able to walk slowly for 200 to 500 yards on level ground, his getting short of breath walking fast or upgrade and his getting short winded when climbing 7 steps. Dr. Kanwal commented also that the Claimant "can't lift." DX 19.

Dr. Byers evaluated the Claimant on May 20, 1986 for the Employer. Based on the history furnished by the Claimant, physical examination, chest x-ray, blood gases, pulmonary function study and electrocardiogram, Dr. Byers opined that "there is no evidence for significant respiratory impairment nor is there radiologic or physical evidence for coal worker's pneumoconiosis." DX 45 and 51.

Dr. Modi evaluated the Claimant at his request on June 23, 1987. He related a history of shortness of breath, a productive cough and wheezing. He also complained of chest pains, arthritis, stomach problems and dizziness. The Claimant was noted to be short of breath at rest. Chest examination revealed wheezing and rhonchi but was otherwise within normal limits. Blood gases and pulmonary function studies were reported above. Dr. Modi diagnosed interstitial pulmonary fibrosis secondary to exposure to coal dust, qq 2/1 in all six lung zones. He opined that the Claimant's work ability had been markedly diminished and that he was totally disabled from doing any meaningful work "because of the above mentioned problems." DX 44.

The Claimant submitted a report of Dr. Nash pertaining to an evaluation which he performed on January 17, 1990. His x-ray interpretation of the film taken that day, as well as the results of the blood gas and pulmonary function studies have been set-forth above. Physical examination revealed the chest to be symmetrical. Respiration rate was 18 per minute and there was mild dyspnea. The fingernails looked normal and there was no clubbing of the fingers. Dr. Nash commented that the FEV₁ results did not meet the Department of Labor disability standards but the MVV results under these rules indicate that he partially qualifies for disability. Dr. Nash's diagnoses included arteriosclerotic heart disease with mild congestive failure, chronic obstructive lung disease and coal worker's pneumoconiosis, Stage 1/1, p/p. He opined that the Claimant is totally and permanently disabled for all work, especially heavy work in a dusty environment like the coal mines. DX 67.

Dr. Nash's deposition was taken by the Employer on June 22, 1990. After reviewing the results of the aforementioned evaluation with him, Employer's counsel asked:

You indicate in your final statement that a return to work as a coal miner would be dangerous to Mr. Deel's health. In the evaluation of the objective measurements, the pulmonary function studies and arterial blood gases, it would appear that although he had thirty-nine years of exposure to coal dust, that there had not been any impairment in his oxygenation based on the testing that you have done, nor had there been any impairment in his Forced Vital Capacity or his FEV₁ (his ability to blow air out during the course of the test or his ability to move the air out in one second). What would in going back to coal mining be dangerous to this man's life, given those factors?

Dr. Nash replied:

Well, as I tried to explain before, the way we come. . . (that is, doctors that do these examinations) come to conclusions is by taking all of the facts from all of the different areas of the examination and then drawing a conclusion from it. Sometimes some factors might be better in one patient than another but we don't rely on any one thing.

And the fact that this man has worked thirty-nine years, that he was short of breath, that he had a cough, that some of the pulmonary function studies were markedly depressed,

that I could see some pulmonary. . . I could see some shadows on the x-ray that indicated to me that he had coal workers' pneumoconiosis, and all these things put together, including his age and including his enlarged heart, and including his high blood pressure, made me think it would be dangerous for him to be any more exposed to . . . dust in the coal mine but exposed to strenuous activity in the coal mine.

DX 71.

Dr. J. Dale Sargent evaluated the Claimant at the request of the Employer on January 6, 1994. He opined:

It is my overall impression that Mr. Deel is not suffering from coal worker's pneumoconiosis nor is he suffering from any respiratory impairment. This determination is made on the basis of normal blood gases for age and a negative x-ray and normal pulmonary functions. I would therefore conclude that Mr. Deel has the respiratory capacity of a normal 72 year old man and has the respiratory capacity to perform any job that a normal 72 year old man could be expected to perform. Specifically, I think he has the respiratory capacity to perform his last job as a mechanic and welder.

DX 83 and 88.

Dr. Ranavaya evaluated the Claimant at the request of his then counsel on April 8, 1994. In addition to performing an examination, chest x-ray, pulmonary function and blood gas studies, Dr. Ranavaya reviewed 80 items of evidence such as x-ray interpretations , prior pulmonary function studies and examination reports. He then concluded:

Mr. Caudle Deel has a history of occupational exposure to dust in the coal mining industry for 39 years, with 25 years spent in underground coal mining. This is a sufficient amount of dust exposure time in which to contract coal workers' pneumoconiosis. Mr. Deel does have radiological evidence of pneumoconiosis. However, the pulmonary function studies performed in my laboratory today were essentially within normal limits.

DX 87.

Dr. Sargent evaluated the Claimant for the Employer again on May 20, 1997. Based on a chest x-ray which he interpreted as negative for pneumoconiosis, normal pulmonary functions and normal blood gases, Dr. Sargent was of the impression that the Claimant is not suffering from pneumoconiosis nor any significant pulmonary impairment. He concluded also that the Claimant had the respiratory capacity to do his last job as a welder or maintenance man, as he had described such jobs, or any job in the mining of coal that a normal 76 year old could be expected to perform. DX 136.

Dr. Hippensteel conducted the most recent evaluation of the Claimant for the Employer on July 10, 2000. The evaluation included a history, physical examination, blood gas study and chest x-ray. Pulmonary function studies were not done because the Claimant feared his heart would be affected by such tests. Dr. Hippensteel concluded that the data he was able to obtain, including normal gas exchange, x-ray and examination findings, did not suggest that the Claimant has pneumoconiosis or any coal dust related disease of the lungs. The Claimant's severe hypertension, severe coronary artery disease with three previous infarctions, coronary artery bypass grafting and continued abnormalities on electrocardiogram, with continued angina, and a possible small stroke, are unrelated to his coal dust exposure, but impair him enough to prevent him from working in the mines. Dr. Hippensteel also reviewed essentially all of the medical evidence then of record and again concluded that the Claimant does not have pneumoconiosis or any other coal dust related disease. He added that there was strong evidence that the Claimant has no permanent impairment in ventilatory or gas exchange from any disease process including coal workers' pneumoconiosis. DX 162A.

Dr. Hippensteel confirmed this opinion during his deposition taken on November 29, 2000. He said that the Claimant's shortness of breath and other symptoms were related to his heart disease. He noted at that time that the Claimant was disabled by arteriosclerotic heart disease which is not related to cor pulmonale or his coal mine employment. EX 22.

The last evaluation of the Claimant was done at his request by Dr. D. L. Rasmussen on October 23, 2000. This included health and occupational histories, pulmonary function studies, resting and after-exercise blood gas studies, and a chest x-ray. Dr. Rasmussen related that the Claimant was required to lift 80 to 100 pounds in his most recent coal mine employment as a welder and mechanic and thus had considerable manual labor. He did not indicate that he had personally read the chest x-ray but noted that Dr. Patel had interpreted it as s/s 1/0. He interpreted the pulmonary function studies and resting blood gas studies as normal. His oxygen transfer was normal after exercise and he was not hypoxic. Dr. Rasmussen concluded:

Overall, these studies indicate normal lung function. The patient retains the pulmonary capacity to perform his last regular coal mine work.

The patient has a significant history of exposure to coal mine dust. He has x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude the patient has coal workers' pneumoconiosis which arose from his coal mine employment.

This patient's coal mine dust exposure has produced no significant loss of lung function.

CX 1 and EX 27.

The record also includes record reviews and opinions from Dr. Fino and a supplemental report from Dr. Hippensteel based on his review of Dr. Rasmussen's report. Dr. Fino's initial review was

based on evidence which had been developed as of April 25, 1994. He opined at that time that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis or any occupationally acquired pulmonary condition, nor was any respiratory impairment present. He concluded that the Claimant was neither partially nor totally disabled from a respiratory standpoint. DX 88. He issued essentially the same assessment after reviewing medical data added to the record as of March 1, 1999, based on negative chest x-rays and normal spirometry, diffusing capacity, oxygen transfer and lung volumes. DX 151. Dr. Hippensteel also reiterated his prior opinion in his supplemental review, opining that Dr. Rasmussen's report mostly supported his prior conclusions. EX 26.

Additional medical reports of record relate to the Claimant's hospitalizations for a myocardial infarction in August 1995 and for a coronary artery bypass graft surgery in May 1996. He was also hospitalized in April 1996 for treatment of pneumonia. It was noted that he had a history of pneumoconiosis which remained stable. Acute exacerbation of chronic obstructive pulmonary disease and pneumoconiosis were included in the discharge diagnoses. DX 119. *See also* EX 7, 8 and 9. He was also examined by a neurologist in September 1997 after an incident diagnosed as a TIA (transient ischemic attack). EX 3.

Mistake of Fact

Judge Neusner concluded in his consideration and reconsideration of this case that the Claimant had not established any of the elements to trigger the presumption under Part 727 of the regulations. I have reviewed the evidence upon which he based his findings and conclusions as well as the evidence which has been submitted subsequently and reach the following conclusions:

§ 727.203 (a)(1), Chest X-ray or Biopsy Evidence

By my count, the record in this case includes 162 readings by 55 physicians of 41 x-rays dating from October 28, 1969 to October 23, 2000. Of these, 35 interpretations of 16 of the films have been classified as positive for pneumoconiosis, i.e., opacities of 1/0 profusion or greater. The rest of the readings are either to the effect that the films are negative for pneumoconiosis or make no specific mention of the disease, except for one which is not classified but indicates pleural abnormalities consistent with pneumoconiosis. I recognize, of course, that the existence or absence of pneumoconiosis cannot be determined by these numbers alone. As the Court cautioned in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. Feb 4, 1997):

In *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), we pointed out that in considering expert opinions, merely 'counting heads' with the underlying presumption that two expert opinions *ipso facto* are more probative than one is a hollow endeavor and contributes little when weighing evidence. *Id* at 52. While we recognize that merely counting heads is not the appropriate manner for the ALJ to weigh numerous and

diverse opinions, we did not suggest that two or three independent qualified opinions were necessarily of less probative value than one. In weighing opinions, the ALJ is called upon to consider their quality. Thus, the ALJ should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and freedom from irrelevant distractions and prejudices.

105 F.3d at 950-951.

The x-ray evidence has been in dispute in this case *ab initio*. Judge Neusner found that the preponderance of the x-ray evidence then of record failed to establish the existence of pneumoconiosis. I agree. The numerous x-ray interpretations before Judge Neusner, by the most qualified physicians, i.e., those who are both board certified radiologists and B-readers, were, at best, in equipoise. More recent x-rays have been interpreted overwhelmingly as negative; only one of the 19 x-rays taken since 1994 has been classified as positive. Furthermore, given the progressive and irreversible nature of pneumoconiosis, *see Lane Hollow Coal Co. v. Director, OWCP*, 137 F.3d 799, 803 (4th Cir. 1998); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315 (3rd Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993), the most recent positive classification (1/0) calls into question the earlier positive interpretations in which the profusion actually decreased over time from 2/2 in 1974, to predominantly 1/1 between 1979 and 1994. As Employer's counsel contends, citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the Claimant failed to establish the existence of pneumoconiosis by the preponderance of the x-ray evidence. I find the same to be true regarding the x-ray evidence added to the record after Judge Neusner's last consideration of the case. There is a single 1/0 reading by a board certified radiologist and B-reader of the latest x-ray, taken October 23, 2000, obtained by the Claimant. This has been countered by negative readings for the Employer by board certified radiologists and B-readers. Additionally, other x-rays, taken in July 1997, August and November 1998, December 1999, and July 2000, submitted at the hearing before me, read by board certified radiologists, pulmonologists and B readers, have been read uniformly as negative. Accordingly, upon my review of the wholly new evidence and the cumulative evidence and upon reflection on the evidence initially submitted in this case, I conclude that the existence of pneumoconiosis is not established by the preponderance of the x-ray evidence.

There is no lung biopsy evidence to be considered in this case.

§727.203 (a)(2), Ventilatory Studies

None of the pulmonary function studies of record when the case was last before Judge Neusner qualify under §727.203 (a)(2) even if the Claimant were 73 inches tall. Therefore, there was no error in his finding that the presumption was not invoked based on the pulmonary function studies then of record.

Of the two studies that have been added to the record since Judge Neusner considered the case, the May 20, 1997 study can not be used as a basis for invoking the presumption as the Claimant declined the MVV test, a necessary element under this regulation. At the time of the latest test, the Claimant was reported to be 70 inches tall. Considering that 26 years have elapsed between the first and last tests, the shorter height can be explained on the basis of the aging process rather than a mistake in measurement. However, giving the Claimant every benefit of doubt, I will evaluate the test as if the Claimant was, in fact, 71.7 inches in height at the time of the October 23, 2000 test. At this height, although the pre-bronchodilator test met the standard for a 71 to 72 inch tall miner, the post-bronchodilator test did not. Furthermore, Dr. Rasmussen concluded that the ventilatory studies were normal, and that the Claimant had “no significant loss of lung function.” I conclude that the pulmonary function studies still do not invoke the presumption.

§727.203 (a)(3), Blood Gas Studies

There are reports of 14 blood gas studies of record in this case dating from July 2, 1974 to October 23, 2000. None of these studies produced values which meet the standards for invoking the presumption under §727.203 (a)(3). The most recent study produced a PCO₂ of 37 and a PO₂ of 77 and was interpreted as normal by Dr. Rasmussen. CX 1& EX 27.

727.203 (a)(4), Well Reasoned and Documented Medical Report

The earliest medical report of record which addresses the question of disability is that of Dr. Buddington who opined that the Claimant **may** develop extreme breathlessness during heavy exertion. In view of the fact that the Claimant’s testimony in this record was that he had help to perform any heavy lifting, I do not find that his last coal mine employment required any significant degree of heavy exertion. I find Dr. Buddington’s opinion to be insufficient to establish that the Claimant has a totally disabling respiratory impairment.

It is not clear whether Dr. Wright’s assessment, that the Claimant is occupationally disabled for coal mining and work in a dusty environment, is based on a totally disabling pulmonary or respiratory condition alone, in that he also has diagnosed arteriosclerotic heart disease. The same may be said for Dr. Nash who deposed that the claimant was disabled from a combination of conditions. Furthermore, it is not clear from Dr. Modi’s report just what “above problems” he was referring to as causing the Claimant’s purported total disability. It is also not clear as to whether Dr. Kanwal’s assessment was based on his interpretation of the medical data or the Claimant’s recitation of his symptoms.

Assuming *arguendo* that the opinions of Drs. Wright, Nash, Modi, Buddington and Kanwal are sufficiently documented and reasoned to support a finding of a totally disabling pulmonary or respiratory condition, they still must be weighed against the contrary medical evidence of record. And, in this regard, the relative expertise of the physicians who have offered reports must be taken into account. Drs. Castle, Robinette, Byers, Fino, Sargent, Ranavaya, Hippensteel and Rasmussen have all opined, in

effect, that the Claimant does not demonstrate that he has a totally disabling pulmonary or respiratory impairment. Drs. Byers, Castle, Fino, Sargent and Hippensteel are board certified in pulmonary disease. I find, therefore, that the weight of the most creditable evidence shows that the Claimant is not suffering from a totally disabling respiratory impairment.

It follows from the forgoing that there was no mistake in fact in the prior decisions in this case finding that the claimant was not entitled to benefits under Part 727.

Change in Conditions

In order to find that the Claimant has undergone a material change in conditions, I must assess all of the new evidence, both favorable and unfavorable and determine whether the Claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (*en banc*), applying standards in *Sharondale Corp. v. Ross*, 42 F. 3d 993, 997-998 (6th Cir. 1994).

Both the issues of the existence of pneumoconiosis, and total disability from the disease, were adjudicated against the Claimant in the prior decision in this case. Based on my findings stated above, I find that neither element has been established under Part 727 by the new evidence and conclude that a material change of conditions has not been shown. Accordingly, the Claimant has not established a basis for modification of the prior denial of his claim.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that there has been a change in conditions or a mistake in a determination of fact in the adverse decision on his claim, he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The request for modification filed by Caudle Deel on March 14, 2000, is hereby DENIED.

A
Alice M. Craft
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR § 725.481 (2001), any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Ave., NW, Washington, D.C. 20210.